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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/723,480	11/28/2000	Dave McDysan	RIC00044	7587
25537	7590	09/21/2009		
VERIZON PATENT MANAGEMENT GROUP 1320 North Court House Road 9th Floor ARLINGTON, VA 22201-2909			EXAMINER BATES, KEVIN T	
			ART UNIT	PAPER NUMBER
			2456	
			NOTIFICATION DATE	DELIVERY MODE
			09/21/2009	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DAVE MCDYSAN, HOWARD LEE THOMAS, and LEI YAO

Appeal 2009-003742
Application 09/723,480
Technology Center 2100

Decided: September 17, 2009

Before JOSEPH L. DIXON, JAY P. LUCAS, and THU A. DANG,
Administrative Patent Judges.

DANG, *Administrative Patent Judge.*

DECISION ON APPEAL

Appellants appeal from the Examiner's non-final rejection of claims 1-40 under 35 U.S.C. § 134 (2002). We have jurisdiction under 35 U.S.C. § 6(b) (2002).

We affirm.

I. STATEMENT OF THE CASE

A. INVENTION

According to Appellants, the invention relates in general to communication networks and, in particular, to an IP-centric communication network (Spec. 1, ll. 25-26).

B. ILLUSTRATIVE CLAIM

Claim 1 is exemplary and is reproduced below:

1. A method of communication in a network access system including an external processor and a programmable access device, said method comprising:

receiving a control message from the external processor, by the programmable access device, to establish a configuration of the programmable access device;

receiving, by the programmable access device, messages from a first network external to the network access system via a first network interface;

communicating a first subset of the received messages from the programmable access device to the external processor for service processing in accordance with the configuration; and

routing a second subset of the received messages not communicated to the external processor from the network access system via a second network interface different from the first network interface to a second network external to the network access system, wherein the second network is different from the first network.

C. REJECTIONS

The Examiner relied upon the following prior art in rejecting the claims on appeal:

Grant	5,027,269	Jun. 25, 1991
Haas	5,115,432	May 19, 1992
Feldman	6,055,561	Apr. 25, 2000
Albert	6,606,316 B1	Aug. 12, 2003
Gai	6,651,096 B1	Nov. 18, 2003
Gibson	6,680,943 B1	Jan. 20, 2004

Claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 stand rejected under 35 U.S.C. § 102(e) over the teachings of Albert.

Claims 5 and 25 stand rejected under 35 U.S.C. § 103(a) over the teachings of Albert in view of Haas.

Claims 16, 18, 35, and 37 stand rejected under 35 U.S.C. § 103(a) over the teachings of Albert in view of Feldman.

Claims 19 and 38 stand rejected under 35 U.S.C. § 103(a) over the teachings of Albert in view of Grant.

Claims 10, 11, 29, and 30 stand rejected under 35 U.S.C. § 103(a) over the teachings of Albert in view of Gai.

Claims 6, 14, 15, 26, 33, and 34 stand rejected under 35 U.S.C. § 103(a) over the teachings of Albert in view of Gibson.

II. ISSUE

Have Appellants shown that the Examiner erred in finding that Albert teaches, either expressly or inherently, “routing a second subset of the

received messages not communicated to the external processor from the network access system via a second network interface different from the first network interface to a second network external to the network access system, wherein the second network is different from the first network” (Claim 1)? In particular, the issue turns on whether the servers in Albert are located within a second network that is different from the first network comprising the forwarding agents and service managers.

III. FINDINGS OF FACT

The following Findings of Fact (FF) are shown by a preponderance of the evidence.

Albert

1. In Albert, a network comprises a large number of network service appliances that intercept relevant packet flows (col. 2, ll. 33-38).
2. The system of Albert comprises forwarding agents 231 and 231, wherein service managers 241 and 242 communicate with the forwarding agents (col. 6, ll. 29-40; Fig. 2A).
3. The system also comprises a group of servers 220 that includes servers 221, 222, and 223 (col. 6, ll. 20-22; Fig. 2A).

IV. PRINCIPLES OF LAW

The *claims* measure the invention. See *SRI Int’l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc). “[T]he PTO gives claims their ‘broadest reasonable interpretation.’” *In re Bigio*, 381 F.3d

1320, 1324 (Fed. Cir. 2004) (quoting *In re Hyatt*, 211 F.3d 1367, 1372 (Fed. Cir. 2000)). “Moreover, limitations are not to be read into the claims from the specification.” *In re Van Geuns*, 988 F.2d 1181, 1184 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321 (Fed. Cir. 1989)).

In rejecting claims under 35 U.S.C. § 102, “[a] single prior art reference that discloses, either expressly or inherently, each limitation of a claim invalidates that claim by anticipation.” *Perricone v. Medicis Pharm. Corp.*, 432 F.3d 1368, 1375 (Fed. Cir. 2005) (citation omitted).

“Anticipation of a patent claim requires a finding that the claim at issue ‘reads on’ a prior art reference.” *Atlas Powder Co. v. IRECO, Inc.*, 190 F.3d 1342, 1346 (Fed Cir. 1999) (citation omitted). “In other words, if granting patent protection on the disputed claim would allow the patentee to exclude the public from practicing the prior art, then that claim is anticipated, regardless of whether it also covers subject matter not in the prior art.” *Id.* (citation omitted).

Of course, anticipation “is not an ‘ipsissimis verbis’ test.” *In re Bond*, 910 F.2d 831, 832-33 (Fed. Cir. 1990) (citing *Akzo N.V. v. United States Int’l Trade Comm’n*, 808 F.2d 1471, 1479 n.11 (Fed. Cir. 1986)). “An anticipatory reference . . . need not duplicate word for word what is in the claims.” *Standard Havens Prods., Inc., v. Gencor Indus., Inc.*, 953 F.2d 1360, 1369 (Fed. Cir. 1991).

The general allegation of patentability does not specify, as required, how the underlined language patentably distinguishes the claimed invention. This form of argument is wholly ineffective in demonstrating

error in the Examiner's prima facie case to establish the patentability of the claims on appeal. *Ex parte Belinne*, Appeal No. 2009-004693, decided Aug. 10, 2009, (BPAI) (informative). Available at: <http://www.uspto.gov/web/offices/dcom/bpai/its/fd09004693.pdf>.

V. ANALYSIS

Claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40

In this decision, we have considered only those arguments actually made by Appellants. Arguments which Appellants could have made but did not make in the Brief have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

On pages 7-8 of the Brief, Appellants assert that “Albert et al. fails to teach” the claimed routing step (App. Br. 7) and then highlight portions of claims 1, 21, and 40 as being in contrast to Albert (App. Br. 8). However, the general allegation of patentability does not specify, as required, how the highlighted language of claims 1, 21, and 40 patentably distinguishes the claimed invention over Albert. This form of argument is wholly ineffective in demonstrating error in the Examiner's prima facie case to establish the patentability of the claims on appeal. *See Ex parte Belinne*, Appeal No. 2009-004693. We find such general allegation of patentability does not meet Appellants' burden. *See* 37 C.F.R. § 1.111(b).

On pages 8-11 of the Brief, Appellants argue that “*Albert et al.* fails to teach the claimed different first and second networks and different first and second network interfaces” (App. Br. 9) since “there is no indication

that servers 220 are located in a network different from any network in which the forwarding agents and service managers may be located” (*id.*). In particular, Appellants contend that “there is absolutely no disclosure in *Albert et al.* indicating that servers 220 are in a ‘network,’ that there is any ‘network interface’ connecting the servers 220 with the forwarding agent, or that the so-called ‘second network’ that the Examiner alleges servers 220 are in, is ‘external to the network access system’ of which the forwarding agent is alleged to be a part” (App. Br. 11). That is, Appellants assert that “servers 220 are not in a second network ‘external’ to the network access system of the forwarding agent and the service manager” since “the group of servers 220 in *Albert et al.* are within the same network as forwarding agents 231 and 232” (*Id.*).

The Examiner finds that “[t]he servers are not part of the agents, they exist as separate nodes in the networked system” and that “they must send communications from the server entity to the agent entity through a connection” (Ans. 13). Thus, the Examiner finds that “if there are packets traveling from the forwarding agent to the servers through the connection as shown in figure 2A, there is a second network” (*Id.*). That is, the Examiner finds that “[i]t is clear from *Albert* that the connection between the servers and the forwarding agent is different than the network between the client and the forwarding agents,” and “[i]f there is a different connection, then there are different interfaces and those connections can be considered separate ‘networks’” (Ans. 13-14).

Thus, we determine on this Appeal whether Albert teaches, either expressly or inherently, “routing a second subset of the received messages not communicated to the external processor from the network access system via a second network interface different from the first network interface to a second network external to the network access system, wherein the second network is different from the first network” (Claim 1). In particular, we address whether the servers in Albert are located within a second network that is different from the first network comprising the forwarding agents and service managers.

By contending that the servers of Albert are not in a second network “external” to the network access system of the forwarding agent and the service manager since servers are “within the same network” as forwarding agents (App. Br. 11), Appellants appear to be arguing that Albert’s sub-system comprising the forwarding agents and service managers and sub-system comprising the servers differ from a “first network” and a “second network” shown as network clouds in the Specification. However, the language of Appellants’ claims simply does not place any limitation on what the term “network” (and thus “network interface”) is to be, is to represent, or is to mean, other than that “the second network is different from the first network” (claim 1).

Thus, the term “network” cannot be confined to a specific embodiment set forth in the Specification when the claims do not recite a specific embodiment. We will not read limitations into the claims from the Specification. *See In re Van Geuns*, 988 F.2d at 1184. Instead, we give the

claims their broadest reasonable interpretation. *See In re Bigio*, 381 F.3d at 1324.

Accordingly, we give “network” its broadest reasonable interpretation as a series of nodes interconnected by communication paths. We find the language of claim 1 does not distinguish the “first network” from a first series of nodes interconnected by communication paths, and does not distinguish the “second network” from a second series of nodes different from the first series of nodes. That is, the “first network” and “second network” cannot be confined to the network clouds as set forth in Appellants’ Specification, as the Appellants contend.

Similarly, we interpret “first network interface” as a connection to the first network and “second network interface” as a connection to the second network.

Albert discloses that a network comprises a large number of network service appliances that intercept relevant packet flows (FF 1). In Albert, forwarding agents and service managers are interconnected by communication paths (FF 2). A skilled artisan would have understood the forwarding agents and service managers interconnected by the communication paths to comprise a network.

Furthermore, in Albert, servers are interconnected by communication paths (FF 3). A skilled artisan would have understood the servers interconnected by the communication paths to also comprise a network. Further, since servers are different from the forwarding agents and the service managers, the artisan would also have understood the network

comprising the servers to be different from the network comprising the forwarding agents and service managers. That is, as the Examiner finds, “[t]he servers are not part of the agents, they exist as separate nodes in the networked system” (Ans. 13), and that since “the connection between the servers and the forwarding agent is different than the network between the client and the forwarding agents ... those connections can be considered separate ‘networks’” (Ans. 13-14).

In the Reply Brief, Appellants admit that “the servers 220 in *Albert et al.* could, conceivably, be located within a network separate from a network comprising the forwarding agents 231, 232, and service managers 1 and 2” (Reply Br. 3). Although Appellants argue that such teachings in *Albert* would be “speculative, at best” (Reply Br. 4), Appellants appear to be arguing that *Albert* does not disclose that the “second network” is “always” and “exclusively” located within a network separate from the “first network.” However, such argument is not commensurate in scope with the claim language since such “always” and “exclusively” language is not recited in Appellants’ claims.

Claim 1 merely claims a “second network” that is different from the “first network.” That is, claim 1 does not distinguish the claimed “second network” from a network comprising servers that is separate from the network that comprises forwarding agents and service managers (first network).

Albert discloses a first network comprising forwarding agents and the service managers interconnected by communication paths, and a second

network comprising servers interconnected by communication paths different from the first network (FF 1-3). Even Appellants admit that Albert could teach such first and second networks (Reply Br. 3).

Thus, we find that Albert teaches the “first network” and “second network (and therefore “first network interface” and “second network interface”) of claim 1. Since anticipation is not an “ipsissimis verbis” test, Albert need not duplicate word for word what is in the claims to anticipate the claims. *See In re Bond*, 910 F.2d at 832-33; *see also Standard Havens Prods.*, 953 F.2d at 1369. That is, Albert need not label the forwarding agents and service managers interconnected by communication paths as a “first network” and label the servers interconnected by communication paths as a “second network” to anticipate the claims. Similarly, Albert need not label the connections to the first and second networks as respectively “first network interface” and a “second network interface.”

Accordingly, we conclude that the subject matter as a whole of claim 1 is anticipated by the teachings of Albert. Thus, we conclude that the Appellants have not shown that the Examiner erred in rejecting claim 1, and claims 2-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 falling with claim 1, under 35 U.S.C. § 102(e).

Claims 5, 6, 10, 11, 14-16, 18, 19, 25, 26, 29, 30, 33-35, 37, and 38

Appellants do not provide separate arguments for claims 5, 6, 10, 11, 14-16, 18, 19, 25, 26, 29, 30, 33-35, 37, and 38 from the rejection of claims

1. As discussed above, we find no deficiency regarding Albert in the rejections of claim 1. Since Appellants have not provided separate arguments, we conclude that the Appellants have not shown that the Examiner erred in rejecting 1) claims 5 and 25 over the teachings of Albert in view of Haas; 2) claims 16, 18, 35, and 37 over the teachings of Albert in view of Feldman; 3) claims 19 and 38 over the teachings of Albert in view of Grant; 4) claims 10, 11, 29, and 30 over the teachings of Albert in view of Gai; and 5) claims 6, 14, 15, 26, 33, and 34 over the teachings of Albert in view of Gibson, under 35 U.S.C. § 103(a).

CONCLUSIONS OF LAW

(1) Appellants have not shown that the Examiner erred in finding that claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 are anticipated by the teachings of Albert.

(2) Appellants have not shown that the Examiner erred in concluding that claims 5 and 25 are unpatentable over the teachings of Albert in view of Haas.

(3) Appellants have not shown that the Examiner erred in concluding that claims 16, 18, 35, and 37 are unpatentable over the teachings of Albert in view of Feldman.

(4) Appellants have not shown that the Examiner erred in concluding that claims 19 and 38 are unpatentable over the teachings of Albert in view of Grant.

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(5) Appellants have not shown that the Examiner erred in concluding that claims 10, 11, 29, and 30 are unpatentable over the teachings of Albert in view of Gai.

(6) Appellants have not shown that the Examiner erred in concluding that claims 6, 14, 15, 26, 33, and 34 are unpatentable over the teachings of Albert in view of Gibson.

(7) Claims 1-40 are not patentable.

DECISION

We affirm the Examiner's decision rejecting claims 1-4, 7-9, 12, 13, 17, 20-24, 27, 28, 31, 32, 36, 39, and 40 under 35 U.S.C. § 102(e) and claims 5, 6, 10, 11, 14-16, 18, 19, 25, 26, 29, 30, 33-35, 37, and 38 under 35 U.S.C. § 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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